A

INTERACTIVE BROKERS LLC

v.

NEO KIM HOCK & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ABU BAKAR JAIS JC
[SUIT NO: 24NCC(ARB)-36-11-2013]
15 JANUARY 2014

C ***CIVIL PROCEDURE:*** *Affidavits - Affidavit in support of application - Application for Mareva injunction by brokerage firm to restrain loan borrowers from disposing of and dealing with their assets - Whether deponent of affidavit in support sworn in affidavit - Whether deponent had personal knowledge of facts sworn in affidavit - Whether s. 114(g)* D *Evidence Act 1950 should be invoked - Rules of Court 2012, O. 14 r. 5*

CIVIL PROCEDURE: *Injunction - Mareva injunction - Application for - Default in loan given for buying and selling companies shares - Allegation that matter ought to be decided in arbitration - Application by* E *brokerage firm to restrain loan borrowers from disposing of and dealing with their assets - Whether there was evidence shown that there was real risk of dissipation of assets by loan borrowers - Whether injunction could be granted through arbitration - Whether injunction should be granted by High Court - Arbitration Act 2005, s. 11*

F ***CIVIL PROCEDURE:*** *Mareva injunction - Abuse of process - Application by brokerage firm to restrain loan borrowers from disposing of and dealing with their assets - Similar application in Singapore High Court - Whether non-disclosure of crucial and relevant facts - Whether amounted to non-compliance of O. 29 r. 1 of Rules of Court 2012 -* G *Whether abuse of court process*

The plaintiff, an online securities and commodities brokerage firm based in the United States, runs the business of buying and selling companies shares and in addition to that, providing loans to its H customers for the purchase of these shares. The defendants were the plaintiff's customers and the present application ('the application') for a *Mareva* injunction ('injunction') arose when the defendants allegedly defaulted on the loans given. The plaintiff argued that the matter ought to be decided in the arbitration and I in furtherance to that, filed the application to restrain the defendants from, *inter alia*, disposing and dealing with their assets.

In opposing the application, the defendants argued that (i) the plaintiff's officer who dealt with one of the defendants' accounts did not swear the affidavit in support ('the affidavit') of the application and as this was not done, adverse inference under s. 114(g) of the Evidence Act 1950 ('the Act') should be invoked against the plaintiff; (ii) the plaintiff did not have personal knowledge of what it deposed as the affidavit sworn of the plaintiff's application failed to satisfy the need required by O. 14 r. 5 of the Rules of Court 2012 ('ROC'); and (iii) there was a material non-disclosure of crucial and relevant facts by the plaintiff that there had been a similar application in Singapore's High Court, which amounted to non-compliance with O. 29 r. 1 of the ROC; (iv) there was no evidence shown by the plaintiff that there was a real risk of dissipation of assets by the defendants; (v) the injunction should not be granted as the same could be allowed by the arbitration itself; and (vi) that there was abuse of court process.

Held (allowing application):

(1) There was sufficient evidence and not inherently improbable from the plaintiff that it has a good arguable case. There was no reason to dismiss the assertions in the plaintiff's affidavit that because of the service rendered to the defendants, substantial amount of monies were owed by the defendants to the plaintiff. There was also basis that the companies' shares were heavily traded by the defendants. When these companies' shares prices nosedive, investigations were carried out by the Singaporean authorities suggesting what were being alleged against the defendants were not mere unfounded statements by the plaintiff. (paras 35 & 36)

(2) There was no reason to disbelieve the deponent on statements which he had affirmed and sworn in an affidavit. The present deponent of the affidavit had personal knowledge as to the facts sworn in the said affidavit and relied on documents he had access to. There was no justification by the defendants to request and no reason for the court to rule that s. 114(g) of the Act should be invoked against the plaintiff. Section 2 of the Act provided that the whole provisions of the Act were not to be applied in relation to affidavit evidence. (paras 45, 46 & 47)

(3) The application by the plaintiff could independently be premised on the provisions of para. 6 of the Schedule to the Courts of Judicature Act 1964 ('CJA') and not O. 29 of the ROC only. The affidavit of the application does not necessarily relate to application for injunction only under O. 29 of the ROC but could also be in relation to application for injunction under para. 6 of the Schedule to the CJA. Most definitely, it related to the application for injunction under s. 11 of the Arbitration Act 2005. (paras 48 & 49)

(4) The words 'to another judge' in O. 29 r. 1 of the ROC must mean a judge in Malaysia and not any other jurisdictions. Therefore, the application before the High Court in Singapore would not attract the said provision. The ROC cannot stand without the CJA which is the parent Act which allows the enactment of the former in the first place. The provisions of the ROC are derived from legislation applicable only in Malaysia and no others. They cannot, by any stretch of imagination, apply also for a High Court judge in Singapore. (paras 52, 53 & 54)

(5) The requirement that there is a risk that the defendants would dissipate their assets was satisfied by the plaintiff. The claim against the defendants amounts to millions in Singapore currency. The huge claim itself was a justifiable concern that the defendant would likely dissipate their assets in the event the arbitration would be decided in the plaintiff's favour. Dissipation of assets can be done in so many ways and one simple method would be by transferring the assets to third party and this is what, *inter alia*, is to be avoided by granting the injunction. (paras 42 & 43)

(6) The allegation that there was abuse of court process by the plaintiff in requesting for the injunction, as alleged by the defendants, was tenuous. The submission by the defendants that the injunction should not be allowed as this could be requested and given in the arbitration itself could not hold water as s. 11 of the Arbitration Act 2005 does allow parties to resort to the High Court for the injunction pending arbitration. (paras 59 & 60)

Case(s) referred to:

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(foll)***

Cik Aniza Yaacob & Ors v. Mostek Malaysia Sdn Bhd & Ors [1987] 1 LNS 127 HC ***(refd)***

Mareva Compania Naviera SA v. International Bulkcarriers SA (The Mareva) [1980] 1 All ER 213 ***(refd)***

Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad Haji Hassan & Ors [2004] 1 LNS 699 HC ***(refd)***

Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH und Co KG [1983] 2 Lloyd's Rep 600 ***(foll)***

Zainal Abidin Haji Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 11(1)(g)
Courts of Judicature Act 1964, Schedule, para. 6
Evidence Act 1950, ss. 2, 114(g)
Rules of Court 2012, O. 14 r. 5, O. 29 r. 1(2A)(f)

For the plaintiff - Rishwant Singh (Farah Shuhadah Razali with him); M/s Zul Rafique & Partners
For the 1st, 2nd, 5th & 8th defendants - Krishna Kumar (D Paramalingam & Mohd Razdan Noor with him); M/s Krish Maniam & Co
For the 3rd & 6th defendants - Yudistra Darma (Sashiraj Uthrapathy with him); M/s Raj, Ong & Yudistra
For the 4th & 7th defendants - Toh Lee Khim; M/s Low & Partners
Watching Brief for Goldman Sachs International - Daphne Koo

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JUDGMENT

Abu Bakar Jais JC:

Background

[1] Enclosure 1 is the plaintiff's originating summons ('OS') for *Mareva* injunction to refrain the defendants from removing and dissipating their assets pending arbitration proceeding between the two parties.

[2] This court heard the parties and allowed the OS. This judgment explains the reasons for granting the application.

A **Material Facts**

[3] The plaintiff as it asserts is an online securities and commodities brokerage firm based in the United States. For the purpose of this application, the plaintiff is best described as
B engaging in the business of buying and selling companies' shares for its customers. The plaintiff however does more than that. It provides loans to its customers for the purchase of these shares. The defendants are its customers. It is alleged that they had defaulted on the loans given and the dispute arising from this
C allegation ought to be decided in the arbitration. Hence pending the arbitration, the OS is filed to restrain the defendants from among others using, disposing and dealing with their assets so as to frustrate the outcome of the arbitration.

D **[4]** Related to the facts above is the recent news reports from Singapore on the investigations initiated by Singapore Stock Exchange and Monetary Authority of Singapore on three companies, Blumont Group Limited, Asiasons Capital Ltd and Lion Gold Corp Ltd ('the companies'). These Singaporean
E companies were investigated because of the acute volatility of their shares prices, culminating in the sharp drop of the same, wiping out billions of Singapore dollars in terms of shares transactions within only a span of a few months since its active trading.

[5] The plaintiff says all defendants, some of which are direct
F and indirect shareholders of the companies, had borrowed its monies to trade on the shares of the same in Singapore. Again more than that, the plaintiff submits that the defendants manipulated the shares of these companies by actively buying and selling these shares through the service of the plaintiff's business
G and through the loans provided for the same by the plaintiff. In this regard, it is important to note that all its business are done through the internet. In that sense there is no physical presence by the plaintiff as in normal business. The effect being, there is also no real or tangible opportunity for the plaintiff to actually and
H surely know what were the defendants up to.

[6] As understood in the fast-moving world of shares transactions in the open market, the active buying and selling of these shares were done for only one reason. It is to create a false
I impression to the public that these are good stocks for greater participation in its trading. Of course this is with the sole aim of generating maximum profit to the stakeholders.

[7] One definite result as far as the plaintiff is concerned after the beehive activity concerning the shares transactions is that all defendants owe monies for the loans granted to trade in the shares. Hence the application *vide* the OS for the injunction.

The Plaintiff's Submission

[8] The summary of the plaintiff's submission is as follows.

[9] There is basis for the application as notice of arbitration had been filed with the International Centre for Dispute Resolution against all defendants for huge claims against each of them for the loans borrowed from the plaintiff.

[10] The application is supported by s. 11 of the Arbitration Act 2005 ('AA') and there is urgency to apply as it cannot wait either until the composition of the tribunal for arbitration or the disposal of the same.

[11] In aid of justice and the fair conclusion of the arbitration itself the injunction ought to be granted as the fruits of the arbitration could not be rightly enjoyed in the event the plaintiff is successful in its claims.

[12] There is a good arguable case for the plaintiff in the arbitration justifying the application for injunction *vide* the OS.

[13] There is also a real risk of the defendants dissipating their assets.

Defendants' Submission

[14] Taken as a whole the summary of the defendants' submission is as follows.

[15] One Neil Swanson the plaintiff's officer who dealt with the accounts of one of the defendants should have sworn the affidavit in support of the application and as this was not done, the principle of adverse inference as stated in s. 114(g) of the Evidence Act 1950 ('EA') is to be invoked against the plaintiff.

[16] Contrary to the provision of O. 14 r. 5 of the Rules of Court 2012 ('RC'), the affidavit sworn in support of the plaintiff's application failed to satisfy the need that the assertion of facts must be within the deponent's own knowledge. It is therefore alleged in respect of this issue the deponent of the plaintiff's affidavit does not have personal knowledge of what he deposed.

[17] There is material non-disclosure of crucial and relevant facts by the plaintiff in its request for the *Mareva* injunction. This amounted to non-compliance with regard to the provisions governing application for injunction specifically O. 29 r. 1(2A)(f) of the RC in that there had already been a similar application in Singapore's High Court which was not disclosed to this court.

[18] There is no evidence shown by the plaintiff that there is real risk of dissipation of assets by the defendants.

[19] There is no concrete evidence to indicate that the plaintiff can fulfil its undertaking for damages and the assertion on the same by the plaintiff is purely a bare statement without sufficient proof.

[20] The injunction should not be granted as the same could be allowed by the arbitration itself and that mode of determining the dispute arising between the plaintiff and defendants as chosen by the parties is given full and similar power to grant the same.

[21] The resultant effect means that there is an abuse of process by the plaintiff in pursuing its application for the injunction.

Court's Findings

[22] This court as any other courts before arriving at the decision pertaining to any disputes must first be guided by the law that governs the subject matter of the said disputes, in this case the law that governs the application of *Mareva* injunction based on the facts of the case.

[23] On this note this court has a duty first to verify and determine whether as asserted, s. 11 of the AA could be used to argue that this provision permits such application for injunction to be made.

[24] In this regard the said statutory provision states:

> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:
>
> (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
>
> (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> (h) an interim injunction or any other interim measure.

[25] As indicated above, the three limbs of s. 11 of the AA allows the granting of the injunction by this court especially s. 11(1)(g) of the AA as noted.

[26] In terms of case law, the relevant case regarding *Mareva* injunction is the namesake case of *Mareva Compania Naviera SA v. International Bulkcarriers SA (The Mareva)* [1980] 1 All ER 213 where the late Lord Denning MR (as he then was) explained that whenever a right exists either in law or equity, a court is enabled to grant an injunction to protect that right. This is further elaborated in the following fashion:

> In my opinion the principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.

[27] Locally our Federal Court in *Zainal Abidin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 LNS 34; [1982] 1 MLJ 260 said:

> The High Court in Malaysia has jurisdiction to grant a *Mareva* injunction in appropriate circumstances as the provisions of paragraph 6 of the Schedule to the Courts of Judicature Act, 1964, are the equivalent of the provisions of section 45 of the English Court of Judicature (Consolidation) Act, 1925.

[28] See also *Metrowangsa Asset Management Sdn Bhd & Anor v. Ahmad Haji Hassan & Ors* [2004] 1 LNS 699; [2005] 1 MLJ 654 and *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50; [1988] 1 MLJ 97 both indicating the power of the courts to grant *Mareva* injunction and its utility.

[29] Therefore it is clear the provision of s. 11 of the AA and the case law indicated this court indeed is empowered to grant the *Mareva* injunction.

[30] Having dealt with the power of the courts to grant *Mareva* injunction, the next duty of this court is to see and determine whether the plaintiff had fulfilled the requirements or conditions for such injunction to be granted.

[31] The Supreme Court's decision in *Aspatra* (*supra*) in granting the *Mareva* injunction took into account whether the party requesting the same had a good arguable case in its claim against the opposing party.

[32] Therefore in the present case, the plaintiff must also show that it has a good arguable case for its claim against the defendants in the arbitration.

[33] Following *Aspatra* (*supra*) too, this is considered a condition or requirement that must be satisfied by the plaintiff.

[34] A good arguable case would mean the standard to be achieved in fulfilling this condition need not be too exacting. As long as there is sufficient basis for the claim by the plaintiff against the defendants for the arbitration, that itself could amount to 'a good arguable case'. That requirement is also satisfied in the opinion of this court if the claim is not on evidence inherently improbable.

[35] On this, there is in the opinion of this court sufficient evidence and not inherently improbable from the plaintiff to conclude it has 'a good arguable case'. In this regard, there is no reasons for this court to dismiss the assertions in the plaintiff's affidavit that because of the service rendered to the defendants, substantial amount of monies are owed by the defendants to the plaintiff.

[36] Also there is basis to take note that the companies' shares were heavily traded by the defendants. When these companies' shares prices nosedive, investigations were carried out by the Singapore's authorities suggesting what are being alleged against the defendants are not mere unfounded statements by the plaintiff.

[37] Of course it must be stressed at this stage this court is not of the finding that the allegations against the defendants by the plaintiff are proven. The defendants have every right to contest those allegations in the arbitration. It is for the arbitration to decide on the merits of the dispute between the plaintiff and the defendants.

[38] At this stage, this court is only concerned whether there is basis not inherently improbable for the evidence to amount to 'a good arguable case' for the plaintiff in the arbitration.

[39] There is also a need to emphasise that this court had also taken note of the opinion expressed as to what would constitute a good arguable case in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH und Co KG* [1983] 2 Lloyd's Rep 600 where it is stated:

> In the circumstances, I consider that the right course is to adopt the test of a good arguable case, in the sense of case which is more than barely capable of serious argument and *yet not necessarily one which the judge believes to have a better than 50 per cent chance of success.*
> (emphasis added)

[40] Adopting the opinion as given above too, this court says the facts as stated in the affidavit of the plaintiff are consistent with the finding of this court that showed there is serious argument that can be mounted by the plaintiff in support of the injunction, even though that argument may not necessarily amount to more than 50 per cent likelihood of success.

[41] That brings this court to the other condition or requirement that must be satisfied by the plaintiff as again narrated in *Aspatra* (*supra*). This is in relation to the fact that the plaintiff must show the risk of the defendants dissipating their assets. In this regard there must be a real risk of dissipation and not a fanciful allegation of risk or risk that is merely a conjecture on the part of the plaintiff.

[42] In this regard, it must be noted the claim against the defendants amounts to millions in Singapore's currency. The huge claim itself is a justifiable concern that the defendant will likely dissipate their assets in the event the arbitration is decided in the plaintiff's favour. In this regard dissipation of assets can of course be done in so many ways and one simple method this can foreseeably be done is by transferring the assets to third parties. This is among others what is to be avoided by granting the *Mareva* injunction.

[43] Therefore this court is of the finding the requirement that there is a risk that the defendants would dissipate their assets is also satisfied by the plaintiff.

[44] This court will now turn to the issues raised by the defendants. The first issue is whether s. 114(g) of the EA could be invoked against the plaintiff for not having the real personnel that had dealt with the accounts maintained by the plaintiff in respect of the defendants' purchase and sale of shares as the deponent of the affidavit.

[45] There is no reason in the finding of this court to rule that s. 114(g) of the EA is to be invoked against the plaintiff. It ought to be appreciated that s. 2 of the EA itself provides that the whole provisions of the EA is not to be applied in relation to affidavit evidence. The provision states:

> This Act shall apply to all judicial proceedings in or before any court **but not to affidavits presented to any court** or officer nor to proceedings before an arbitrator.
> (emphasis added)

[46] Therefore when it comes to affidavit evidence as in the OS before this court now, there is no justification for the defendants to request that the adverse inference principle as enshrined in s. 114(g) of the EA be invoked by this court.

[47] Furthermore there is no cogent reasons advanced by the defendants as to why the affidavit of the plaintiff as it stands now cannot be taken into account. Regarding this issue too this court could not agree that the present deponent of the affidavit of the plaintiff has no personal knowledge as to the facts sworn in the said affidavit. Paragraph 2 of the said affidavit affirmed that the deponent has personal knowledge and the deponent is relying on documents he had accessed to. There is again no reasons to disbelieve the deponent on statements which he had affirmed and sworn in an affidavit.

[48] As stated earlier, there is contention also by the defendants that the plaintiff failed to disclose that there had been a similar application before the High Court in Singapore. As such according to the defendants this non-disclosure contravenes O. 29 r. 1(2A)(f) of the RC. On this, it is opined that the application of *Mareva* injunction by the plaintiff can be premised on the provisions of para. 6 of the Schedule to the Courts of Judicature Act 1964 ('CJA') as explained in *Zainal Abidin* (*supra*) and not only on O. 29 of the RC. Independently the plaintiff could rely on para. 6 of the Schedule to CJA without O. 29 of the RC. That paragraph states:

> Power to provide for the **interim preservation of property the subject matter of any cause or matter by sale or by injunction** or the appointment of a receiver or the registration of a caveat or *lis pendens* or in any manner whatsoever.
> (emphasis added)

[49] It therefore means that the affidavit in support of the application does not necessarily relate to application for injunction only under O. 29 of the RC but could also be in relation to application for injunction under para. 6 of the Schedule to CJA. And most definitely it relates to the application for injunction under s. 11 of the AA.

[50] Therefore even if it is true that O. 29 r. 1(2A)(f) of the RC has been infringed, that affidavit in support can still stand, supported by para. 6 of the Schedule to CJA and also s. 11 of the AA and not the whole provisions of O. 29 of the RC. The sum effect being the provisions of O. 29 r. 1(2A)(f) of the RC on non-disclosure, even if it is true, does not apply against the plaintiff.

[51] In addition, O. 29 r. 1(2A)(f) of the RC states:

> The affidavit in support of an application made *ex-parte* must contain a clear and concise statement of any similar application made to another Judge and the order made on that application.
> (emphasis added)

[52] As noted the words 'to another judge' must mean a judge in Malaysia and not any other jurisdictions. Therefore the application before the High Court in Singapore would not attract the above provisions of our own RC. This is fortified when one look at the Preamble of the RC which states:

> In exercise of the powers conferred by **section 17 of the Courts of Judicature Act 1964 [Act 91]** and section 4 of the Subordinate Courts Rules Act 1955 [Act 55]…the Rules Committee and the Subordinate Courts Rules Committee make the following rules…
> (emphasis added)

[53] First the RC therefore cannot stand without the CJA which is the parent Act that allows the enactment of the RC in the first place.

[54] Also the above statutory provision of CJA mentioned in the Preamble indicated the provisions of RC are derived from a legislation applicable only in this country and no others. That

statutory provision of CJA and by extension the RC cannot by any stretch of imagination apply also for a High Court's judge in Singapore.

[55] It is most opportune in this regard to note the decision of the case *Cik Aniza Yaacob & 763 Ors v. Mostek Malaysia Sdn Bhd & 2 Ors* [1987] 1 LNS 127; [1988] 1 MLJ 451 where the High Court among others agree with the Industrial Court that since the latter is a creature of statute it has no extra-territorial jurisdiction in the United States.

[56] Likewise the order made by the judge of the High Court in Singapore on an application for similar injunction cannot come within the purview of the specific provision of O. 29 r. 1(2A)(f) of the RC as the word 'judge' in that provision must be confined only to a Malaysian judge.

[57] In this regard there is no dispute by all parties to this application that no Malaysian judge had given or been requested to give a similar injunction except in this court.

[58] On the doubt cast on the plaintiff that the undertaking for damages is a whitewash, this court again has no reason to dispute the assertion that the plaintiff is a member of Interactive Brokers Group Incorporation, a company listed in NASDAQ with more than USD4.8 billion in equity capital. There is therefore sufficient reason for this court to form an understanding that the plaintiff will be in a position to honour the need to pay any damages in the event this is required.

[59] The submission by the defendants that the injunction should not be allowed as this can be requested and given in the arbitration itself cannot with respect hold water as the provision of s. 11 of the AA as narrated earlier do allow for parties to resort to the High Court for the injunction pending arbitration.

[60] On the whole therefore the allegation there is abuse of process by the plaintiff as alleged by the defendants in requesting the injunction is with respect tenuous.

Decision

[61] Based on the foregoing the application for *Mareva* injunction *vide* encl. 1 is allowed with costs reserved for the determination of the arbitration on the conclusion of the substantive dispute.